of agency aims, urge that it is most desirable that the courts continue to scrutinize closely the records of administrative actions where rules have been ignored, for hiding behind a "mere" procedural error may be a substantial injustice. In rebuttal, from the agencies' view, it is admitted that the judiciary has done much to discourage the ignoring of regulations and customs. While this is not necessarily to be faulted, the nature of the administrator's duties and the vast volume and complexity of the business which he faces require that he retain some discretion if substantial justice is to be done. The establishment of all-embracing and uniformly applicable regulations will not insure this. The real question should always be whether or not due process has been done. It is submitted that in the future an appellant should not be allowed to avail himself of even the most flagrant disregard of procedural rules unless he can also show that the procedural error caused him injustice.[33]

GERALD E. FARRELL

Antitrust—Antitrust Civil Process Act—Investigation of Premerger Activities.—***United States v. Union Oil Co.***[1]—Union Oil Co. filed a petition to set aside a Civil Investigative Demand issued by the Department of Justice pursuant to the Antitrust Civil Process Act (ACPA).[2] The demand requested documents relating to an investigation of "proposed acquisitions of fertilizer companies by petroleum companies" for the purpose of "ascertaining whether there is or has been a violation of"[3] Section 7 of the Clayton Act.[4] The dis-

[33] Morgan v. United States, 304 U.S. 1, rehearing denied, 304 U.S. 23 (1938); see Missouri ex rel. Hurwitz v. North, 271 U.S. 40 (1926), where Mr. Justice Stone, speaking of due process, said:

> Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.

Id. at 42.

[1] 343 F.2d 29 (9th Cir. 1965).

[2] 76 Stat. 548 (1962), 15 U.S.C. §§ 1311-14 (1964).

[3] Part of the demand was reproduced in a footnote in the opinion, the relevant portions of which are set forth herein:

> You are hereby required to produce . . . the documentary material in your possession, custody or control described on the attached schedule . . . .
>
> This civil investigative demand is issued pursuant to the provisions of the Antitrust Civil Process Act . . . in the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Sec. 18 [Clayton Act, Section 7] by conduct of the following nature: *The proposed acquisitions of fertilizer companies by petroleum companies.*

Attached was a schedule of documents:

> 1. Each survey, study, report or other writing prepared or used by the corporation, its officers, directors or employees, which refers or relates to the maintenance or improvement of the corporation's position in the fertilizer market, including each such document relating to any acquisition, merger, sale of assets, or consolidation consummated or considered by the corporation.

Supra note 1, at 30 n.1.

trict court granted Union's petition on the ground that the ACPA may not be used to investigate prospective acquisitions which, if consummated, might violate section 7.[5] On appeal by the Department of Justice, the Ninth Circuit HELD: The ACPA may not be used to investigate proposed acquisitions since such acquisitions are not "violations" of the antitrust laws within the meaning of the ACPA.

In construing the statute, the court refused to go beyond its literal wording. Section 3(a) of the ACPA[6] authorizes the Attorney General to serve a demand upon "any person under investigation" who may be in control of documentary material relevant to a civil antitrust investigation. "Antitrust investigation" is defined in section 2(c)[7] as "any inquiry conducted . . . for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation." Section 2(d)[8] defines "antitrust violation" as "any act or omission in violation of any antitrust law or any antitrust order." Stating that Section 7 of the Clayton Act cannot be violated until there has been a consummated acquisition, the court held, therefore, that a proposed acquisition could not be a "violation" of that section. Thus, since the ACPA is limited to use where there "is or has been" a violation of the antitrust laws, it cannot be employed to aid in investigating conduct which may at some future time become a "violation."

The Government's chief contention was that "antitrust violation" should not be limited merely to describe conduct made unlawful by the substantive antitrust law but should be interpreted to include "any conduct for which the United States could bring an action and obtain relief under any antitrust law."[9] The Government argued that the former interpretation of "violation" results in an artificial distinction between the power to investigate pursuant to a possible action to enjoin a violation of section 7 (under section 15[10]) and the power to investigate pursuant to a possible action to divest (under section 11[11]). The court, however, felt that this distinction was clearly intended by the statute, reasoning that a proposed acquisition could not be made a "violation" of the Clayton Act merely because it was enjoinable under section 15. The court also made light of the further contention of the Government that the ACPA was intended to be used as a tool to prevent unlawful mergers in conjunction with proposed legislation which would require notice before a merger could be consummated, adding that nothing in the legislative history of the ACPA indicated such a connection.

On the facts before it, the court probably had no other choice but to set aside the demand. Although the Justice Department was investigating three other oil companies which were contemplating the acquisition of fertilizer companies,[12] the Government did not allege that Union was in any way con-

[4] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).
[5] Petition of Union Oil Co., 225 F. Supp. 486 (S.D. Cal. 1963).
[6] 76 Stat. 548 (1962), 15 U.S.C. § 1312(a) (1964).
[7] 76 Stat. 548 (1962), 15 U.S.C. § 1311(c) (1964).
[8] 76 Stat. 548 (1962), 15 U.S.C. § 1311(d) (1964).
[9] Brief for Appellant, p. 20, supra note 1.
[10] 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1964).
[11] 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).
[12] Brief for Appellee, p. 16, supra note 1.

nected with any of these transactions or that it had any information relevant thereto, nor did it allege that Union was in the process of making such acquisitions or even considering such a move.[13] Thus, it is difficult to perceive how Union could properly be considered a "person under investigation,"—a vital prerequisite for the issuance of a demand under the ACPA. Hence, there was apparently no justification for the Justice Department to look through Union's records. However, perhaps out of concern that if the Government's arguments were accepted the Attorney General might be able to conduct fishing expeditions,[14] the court went on to formulate the broad rule that the ACPA does not authorize the use of the civil investigative process to inquire into *any* proposed acquisition. In so doing, the court certainly went much further than required and unnecessarily set a precedent which seriously impedes the ACPA's intended usefulness.

Had the court wished, they might have found in the language of the ACPA a basis for the Government's argument that the ACPA applies to all of the antitrust laws, including procedural provisions such as section 15. According to Section 2(a) of the ACPA,[15] "antitrust law" includes:

> (1) Each provision of law defined as one of the antitrust laws . . . [by Section 1 of the Clayton Act[16]];
>
> (2) The Federal Trade Commission Act; and
>
> (3) *Any statute* enacted [after this act] . . . *which* prohibits, or *makes available* to the United States in any court of the United States *any civil remedy* with respect to . . . [unfair trade practices or monopolization of commerce]. (Emphasis added.)

In addition, "antitrust order" is defined by section 2(b)[17] as "any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law." Taking these definitions, in

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[13] See note 3 supra. It is difficult to imagine why the Government decided to appeal this case. If it were seeking a test case in order to define the limits of its powers under the ACPA, the choice of this investigative demand upon Union as the vehicle to accomplish such a purpose appears to have been a poor one. It does not seem that the Attorney General had any legitimate reason to look at Union's records; the requirement that the demandee be a "person under investigation" negates the possibility that the ACPA could be used by the Justice Department to make an industry-wide survey, even if several companies in the particular industry happen to be violating the laws. This is not to say that a corporation must be suspected of a violation before it can be investigated. It need only have information relevant to a possible violation in order to qualify as a person under investigation. See 108 Cong. Rec. 18407 (1962) (report of the joint conference to resolve differences between the two versions of the bill); 108 Cong. Rec. 13995 (1962) (remarks of Congressman Smith); 108 Cong. Rec. 4005 (1962) (remarks of Congressman Celler).

[14] Altough the decision in Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 396 (D. Minn. 1963), aff'd, Gold Bond Stamp Co. v. United States, 325 F.2d 1018 (8th Cir. 1964), indicated that the ACPA now allows the Justice Department to engage in such piscatory excursions, it is doubtful that Congress so intended. See, e.g., 108 Cong. Rec. 18408 (1962) (remarks of Congressman MacGregor).

[15] 76 Stat. 548 (1962), 15 U.S.C. § 1311(a) (1964).

[16] Section 1 includes the Clayton Act within its definition of "antitrust laws." 38 Stat. 730 (1914), 15 U.S.C. § 12 (1964).

[17] 76 Stat. 548 (1962), 15 U.S.C. § 1311(b) (1964).

addition to those previously cited, it could be argued that the ACPA was intended to apply to each and every provision of the antitrust laws and to allow an investigation prior to proceeding under *any* provision thereof, as the Government contended. Even though section 2(d) defines "antitrust violation" as a "violation of any antitrust law," and there may be some conceptual difficulty in "violating" a procedural provision such as Section 15 of the Clayton Act which merely provides a civil remedy to prevent violations of the act, still, section 15 does indicate what practices may give rise to an injunctive proceeding and thus does set out some substantive standards that could be "violated."

The legislative history of the ACPA further supports the Government's position. That history reveals that several premerger notification bills were pending in Congress[18] along with the ACPA, which would amend Section 7 of the Clayton Act to provide for notice to the Department of Justice before a merger could be consummated.[19] However, of what use would be such notification if there were no method of investigating proposed mergers before they became consummated? In his remarks introducing premerger notification legislation in the Senate,[20] Senator Kefauver stated that he felt the bill was a necessary adjunct to the ACPA and that the bills effectively supplemented each other. Congressman Celler, sponsor of the ACPA in the House of Representatives, noted that the ACPA was "particularly needed in the case of *contemplated mergers*." (Emphasis added.)

> [T]his bill [the ACPA] would permit the Department [of Justice] to obtain relevant evidence prior to the merger, so it could go into court and get a temporary injunction *restraining a proposed merger in advance* . . . . So the adoption of this bill may render premerger notification unnecessary.[21] (Emphasis added.)

Thus, there appears to have been a clear intent by the Legislature to give the Justice Department the power to investigate proposed mergers; the premerger bill was merely to provide the Department with the additional advantage of official notification of pending mergers in case it did not otherwise know of them. The court, however, decided that, because of the brevity of the

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[18] 107 Cong. Rec. 142 (1961) (introduced by Senator Kefauver); 107 Cong. Rec. 990, 1455, 5297, 6910 (1961) (four bills introduced in the House by various Congressmen).

[19] The bills generally provided for a 60-day notice. Supra note 1, at 36.

[20] 107 Cong. Rec. 188 (1961). (remarks of Senator Kefauver).

[21] A more complete quotation follows:

> The bill is . . . particularly needed in the case of contemplated mergers . . . . This would give the Department the power to get the information and the documentary evidence so that if a merger that is contemplated is unlawful, such mergers can be prevented before they are consummated . . . . I am inclined to believe if we pass this bill, we need not have any need to pass the Premerger Notification Act. . . .
>
> . . . . The Department of Justice has stated that it generally has advance information regarding significant mergers, and this bill would permit the Department to obtain relevant evidence prior to the merger, so it could go into court and get a temporary injunction restraining a proposed merger in advance . . . . So the adoption of this bill may render premerger notification unnecessary.

108 Cong. Rec. 3998 (1962) (remarks of Congressman Celler).

notification period, such legislation really did not facilitate investigation of proposed mergers and that its resulting function was the same as the ACPA in providing the Justice Department with information which would enable it to "bring a suit to undo a freshly consummated merger before the 'scrambling' was such that divestiture was inappropriate."[22]

It appears that the court thus misconstrued the implications of the intended cooperation between the premerger legislation and the ACPA. The effect of the holding is to leave the Department of Justice, at least in respect to investigations of proposed mergers and acquisitions, back where it started before its seven-year struggle to have the ACPA enacted into law. Before the ACPA there were only four possible methods available for obtaining the information upon which the Department depended to enforce the antitrust laws,[23] all of which were recognized by Congress as clearly inadequate for civil proceedings.[24] A further review of the legislative history indicates little opposition to giving the Attorney General the investigatory power he desired, the only real debate centering around the safeguards to be included in the statute to protect potential demandees under the act.[25]

The result of this case would be less serious if there were some existing machinery to fill the investigative void created. However, the only other federal agency with sweeping enforcement powers over mergers is the FTC,[26] and, however broad its powers may be, the FTC is limited to obtaining documentary material from corporations being "investigated or proceeded against,"[27] and it only has power to issue cease and desist orders.[28] There is no provision whereby it could obtain preliminary injunctions from a court[29] comparable to the power of the Attorney General to do so under Section 15 of the Clayton Act. Thus, it appears that the Justice Department must resort to its old methods of obtaining information upon which to base a section 15

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[22] Supra note 1, at 36.

[23] The four methods are as follows: (1) Voluntary cooperation, which has not been wholly satisfactory; (2) grand jury with its subpoena powers, but this may be used only if criminal action is contemplated; (3) requesting the Federal Trade Commission to conduct the investigation, which has never been tried and is considered unworkable; (4) filing a civil complaint and using the discovery procedures of the Federal Rules of Civil Procedure, which is frowned upon by the courts and is not a proper method of investigation. 105 Cong. Rec. 14608 (1959) (remarks of Senator Kefauver).

[24] See, e.g., 107 Cong. Rec. 189 (1961) (remarks of Senator Kefauver); 105 Cong. Rec. 14608 (1959) (remarks of Senator Kefauver).

[25] See, e.g., 108 Cong. Rec. 13994 (1962) (remarks of Congressman Patman); 108 Cong. Rec. 4004 (1962) (remarks of Congressman MacGregor); 105 Cong. Rec. 14609 (1959) (remarks of Senator Kefauver).

[26] 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

[27] 38 Stat. 722 (1914), 15 U.S.C. § 49 (1964). That one need not be suspected of a violation in order to be under investigation in connection with a suspected violation by another business, see FTC v. Harrell, 313 F.2d 854, 856 (7th Cir. 1963); FTC v. Bowman, 149 F. Supp. 624, 627 (N.D. Ill. 1957). As to a similar meaning intended for the ACPA, see note 13 supra.

[28] 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(b) (1964).

[29] Hunt Foods & Indus., Inc. v. FTC, 286 F.2d 803, 806 (9th Cir.), cert. denied, 365 U.S. 877 (1961), (FTC may make a precomplaint investigation only where there is or has been a violation); FTC v. International Paper Co., 241 F.2d 372, 373 (2d Cir. 1956) (FTC has no power to obtain a preliminary injunction).

proceeding, and the FTC must wait for a consummated acquisition before it can issue a cease and desist order.

This decision, therefore, has created a serious void which should quickly be filled. Some agency must have the responsibility and the power to prevent mergers which will violate the antitrust laws if consummated, especially in view of the economic damage and the often near impossibility of unscrambling companies which have been merged for a substantial period of time. It would appear that an amendment to the ACPA which would allow the Justice Department to investigate proposed mergers may be necessary in order to counteract the decision in the instant case.[30]

It thus appears that the court in this case, by going beyond the issues before it, has done a disservice to the cause of antitrust law enforcement. Despite the court's apprehension, there is no reason to believe that the Justice Department would exercise its power improperly (notwithstanding its attempt in this case) because there are already sufficient safeguards built into the ACPA. A more strict interpretation of "person under investigation" would have solved this case equitably. The fact that every disputed demand will be examined by a court[31] should be a sufficient safeguard so that a court need only pass upon the legality and sufficiency of the demand itself, rather than undertake to narrow or construe the act beyond what is required by the facts before it. A later decision by another court of appeals to remedy the situation and set the ACPA back on an even keel would be most welcome.

LAWRENCE A. MAXHAM

Constitutional Law—Twenty-first Amendment—Price Regulation—Extra-territorial Effects.—***Joseph E. Seagram & Sons, Inc. v. Hostetter.***[1] —The New York Legislature has amended the state Alcoholic Beverage Control Laws[2] to insure that the wholesale liquor prices in New York are no higher than the lowest wholesale prices charged by brand owners anywhere else in the country. To this end, section 9 of the new law requires that a

[30] A less effective but nevertheless valuable alternative would be for the FTC to make greater use of its rule-making power, 38 Stat. 721 (1914), 15 U.S.C. § 46(g) (1964), to promulgate rules for the guidance of corporations and corporate counsel in evaluating proposed acquisitions or mergers. Although not a method of enforcement, such rules would provide a reliable guide and would be uniform—both distinct improvements over the present situation. In Permanente Cement Co., Trade Reg. Rep. Tr. Binder, 1963-1965 F.T.C. Complaints, Orders, Stipulations ¶ 16885 (1964), the FTC indicated it intended to hold public hearings and formulate rules for guidance purposes as authorized by its Rules of Practice, 16 C.F.R. § 1.63 (Supp. 1964). However, since a set of such rules must be confined to a single industry, it will be a long time before a significant portion of American industry will have the use of them. See Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Laws, 78 Harv. L. Rev. 385 (1964); Note, 40 N.Y.U.L. Rev. 771, 782 (1965).

[31] The demand may be enforced in court by the Government, under 76 Stat. 551 (1962), 15 U.S.C. § 1314(a) (1964); or it may be questioned in court by the demandee, under 76 Stat. 551 (1962), 15 U.S.C. § 1314(b) (1964).

[1] 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965).

[2] N.Y. Sess. Laws 1964, ch. 531.